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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 399

DANIEL ROWAN, d/b/a AMERICAN BOOK SERVICE, ET AL., APPELLANTS

v.

UNITED STATES POST OFFICE DEPARTMENT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinions of the three-judge district court (App. 58) are reported at 300 F. Supp. 1036.

JURISDICTION

The judgment of the district court was entered on June 18, 1969, "effective nunc pro tunc as of April 30, 1969." (App. 80.) The notice of appeal was filed on May 28, 1969 (App. 2). This Court noted probable jurisdiction on October 27, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether 39 U.S.C. (Supp. IV) 4009, which allows unwilling recipients of offensive advertisements to prevent all further mailings from the sender to them and

their minor children living with them, abridges any right of free speech.

2. Whether Section 4009 is unconstitutionally vague, lacking in adequate standards, or overboard.

3. Whether the notice and hearing procedures of Section 4009 deprive mailers of due process of law.

STATUTES INVOLVED

The provisions of 39 U.S.C. 4009 are set out in the Appendix, pp. 53–55.

STATEMENT

Appellants are businessmen engaged in the mail order trade (App. 7). Some sell and distribute books and other materials through the mail; others buy and collate lists of names and addresses of persons who might wish to buy these materials and furnish these lists to mail order houses (*Ibid.*). They brought this action seeking to enjoin the operation of the anti-pandering statute, enacted as Title III of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 613, 645, 39 U.S.C. (Supp. IV) 4009. Appellants all claim to have received numerous prohibitory orders under the statute, directing them to refrain from any further mailings to designated addressees and to remove such addressees from the mailing lists in which they deal; a number are involved at various stages of administrative proceedings resulting from alleged failure to comply with such directives (App. 8). None complains that the Postmaster General has instituted enforcement proceedings against it, the necessary prerequisite to the only sanction provided by the statute. Appellants' attack on the statute is wide-ranging, including contentions that it abridges free speech, un-

lawfully delegates power, is void for vagueness, and deprives them of due process of law (App. 8–10).

THE STATUTORY FRAMEWORK

Action under Section 4009 begins when a person who has himself received, or whose children residing with him have received, "a pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative * * *," § 4009(a), complains to the Post Office Department. If the addressee so requests, "the Postmaster General shall issue an order * * * directing the sender and his agents or assigns to refrain from further mailings to the named addresses." § 4009(b). The order also directs the sender to delete the addressee's name from the sender's mailing lists and prohibits him from trading in lists from which the deletion has not been made. § 4009(c). Upon the request of the addressee, the order must include the names of minor children under the age of nineteen who reside with the addressee. § 4009(g).

No provision is made for immediate review or challenge of such an order, but its violation brings no sanctions. In the event of apparent violation, the Postmaster General "shall" begin an administrative proceeding by service of a complaint upon the sender. § 4009(d). The statute allows fifteen days for the sender to respond to the complaint and request an "appropriate hearing." § 4009(d). Regulations adopted pursuant to the Act require that testimony at the administrative hearing be under oath, be subject to cross-examination, and be recorded stenographically. 39

C.F.R. § 956.7 (App. 32). Detailed provisions are made for the taking of testimony, and submission of depositions and documentary evidence, objection to the admission of evidence, and other procedural matters. 39 C.F.R. §§ 956.7–956.9 (App. 32–34).

If the Department determines after this hearing or on default that the original order has been violated, the Postmaster General "is authorized to request the Attorney General" to apply to a United States District Court for an order directing compliance with the administrative order. § 4009(d). The Attorney General, in turn, is "authorized" to make such an application. *Ibid.* If he does so and if the district court issues an enforcement order, the sender then for the first time becomes subject to the possibility of sanction for his further acts: failure to obey the district court's order may be punished as contempt. § 4009(e). There is no provision for any other sanction, criminal or regulatory, in the act or in the regulations.

THE BACKGROUND OF THE LEGISLATION

Section 4009 grew out of the continuing congressional concern with use of the mails to distribute obscenity and, in particular, a rapid increase in the sending of unsolicited lewd and offensive advertisements through the mails, to both adults and children. It began as H.R. 426 and H.R. 8215, which were the subject of hearings before the Subcommittee on Postal Operations of the House Committee on the Post Office and the Civil Service, 90th Congress, First Session. (Hereinafter cited as *House Hearing*). These bills were carryovers from previous Congresses, in which

the House but not the Senate had enacted similar legislation. *House Hearing,* pt. I, p. 6. They were shaped by the knowledge that in five years the number of complaints received by the Post Office regarding lurid or indecent advertising had risen from 50,000 to 250,000 per year (*id.* at 1), and that perhaps twenty million pieces of such advertising were mailed annually. *House Hearing,* pt. II, p. 70.

It was not only that such mailings were offensive to adults to whom they might be mailed indiscriminately, *id.* at 63, 71; the committee also learned that, by design or otherwise, they frequently reached the hands of children, where they might have a substantial effect on emotional development. *Id.* at 41 (Dr. John Cavanagh); 54–56 (Dr. Joseph Slap); 73–75 (Dr. Jack Chernus); compare *Ginsberg* v. *New York,* 390 U.S. 629, 641–643 and n. 10. Indeed, the legislative history throughout shows a pervasive concern with the effect such advertising might have on children, and the importance of assisting parental control over the material children read. See, *e.g.* 113 Cong. Rec. 28660, 34231 (1967); H. Rep. No. 722, 90th Cong., 1st Sess. 68 (1967); Hearings on H.R. 7977 before the Senate Committee on Post Office and Civil Service, 90th Cong., 1st Sess., pp. 536, 547, 554 (1967) (hereinafter cited as *Senate Hearing*); *House Hearing,* pt. I, pp. 4–5, 9–10, 21; pt. II, pp. 48–50, 56–61, 62, 66. Because mail recipients are unable to ascertain the contents of their mail before they or their children open and confront it, Congress intended to safeguard the privacy

of what it found to be an essentially captive audience.[1] S. Rep. No. 801, 90th Cong., 1st Sess., p. 37 (1967); H. Rep. No. 722, 90th Cong., 1st Sess., p. 69 (1967); *Senate Hearing,* p. 542; *House Hearing,* pt. I, pp. 1, 11, 22, 26.

As noted, the House Committee considered two draft bills in its hearings. H.R. 426 differed in language, but was similar in effect to the section as ultimately enacted. It provided that anyone could return to the Postmaster General mail which he personally considered to be obscene, with a request that the sender be notified to send him no more. As under Section 4009, violations of this request led to administrative hearings, enforcement by court order and, on any further violations, contempt sanctions. *House Hearing,* pt. I, p.2. H.R. 8215, which had been drafted with Post Office assistance, introduced the notion of pandering, and the remedy of deletion of names from mailing lists; under this bill, however, the Postmaster General's order was final and subject to enforcement by stated criminal sanctions. Moreover, it was clear that the issue whether an advertisement was pandering or not was to be decided by the Postmaster General, not by the complaining recipient. *Id.* at 3.

[1] At all stages of congressional consideration, the intention to implement the wishes of unwilling recipients of offensive advertisements without affecting the general flow of communications was manifested in the clearest terms. As was stated in the House committee hearing:

"Adults who want to receive obscene material can receive it under this bill [H.R. 8215]; but a free society does not compel people to receive sexually provocative material, it does not compel them to be part of a captive audience." [*House Hearing,* pt. I, p. 11 (remarks of Rep. Olsen)].

The bill as reported by the Committee was an amalgam of these two provisions. It adopted the "pandering" orientation of H.R. 8215, and the contempt enforcement mechanism of H.R. 426. It required an administrative determination by the Postmaster General that the particular mailing piece came within the proscribed class of pandering advertisements, "as that term is used in the *Ginzburg* case," H. Rep. No. 722, *supra,* p. 69, and included as part of its remedy the mailing list provisions now part of Section 4009; the only future mailings prohibited, however, were mailings of more "pandering advertisements" to the complaining addressee. *Id.* at 69–70, 125–126. Other items could be sent.

The bill was amended on the floor of the House by Congressman Waldie, who had already made plain in Committee his view that the Post Office belonged out of the censorship business, and that the addressee alone should decide what advertisements he considered fit to receive. *House Hearing,* pt. I, 13–14, 16–17, 25–26. The amendment he offered brought the bill into its present form, making the question of the sexual nature of advertising a matter "in [the] sole discretion" of the addressee, and providing for an order directing the sender to refrain from making "*any* further mailings to the designated addressees." In explanation, he stated:

> * * * My amendment suggests that should not be a determination of the Postmaster General at all but a determination of the individual who receives the material. The standards of conduct that I enforce in my particular house-

hold are not those that the Supreme Court has laid down in terms of materials that are available for my children's consumption. I am the supreme court in the particular household in which my children reside, and there is no appeal from that determination. So I have said in my amendment that if you receive literature in your household that you consider objectionable for the reasons Mr. CUNNINGHAM states, then in your sole discretion you can inform the Postmaster General to have your name stricken from that mailer's mailing list. If he does not do so, he violates that order, *and the only determination left for the discretion of the Postmaster General, is did he or did he not remove your name from the mailing list.* Then you are able to prevent that man from making any further mailings to you, but *the sole determination as to whether the literature you receive is objectionable or not is within your discretion and you are not second-guessed on that discretion.*

The bill that is before us severely limits your right to refrain from receiving objectionable material, because you must then refrain from receiving only material from the shipper that the Supreme Court has held to be objectionable. I suggest that the standards you may desire for your children and the standards that I desire for my children are far more strict than the standards that the Supreme Court has set in terms of controlling governmental censorship. *By removing from this section, the right of the Government to involve itself in any determination of the content and nature of these objectionable materials precludes the first*

> *amendment from having any application whatsoever.* [43 Cong. Rec. 28660 (1967); emphasis supplied].

There was substantially no opposition to the amendment.

The bill was not changed from this point forward; its legislative history is dominated by the two themes Congressman Waldie introduced—complete discretion on the part of an addressee to identify advertisements he found objectionable, and a complete cessation of mail from that sender, in both instances to avoid administrative and constitutional problems which were perceived to be of the first order. *E.g., Senate Hearings,* 544, 548, 554. Although Congressman Cunningham, testifying in the Senate Hearings, stressed the limitation to pandering materials, *id.* at 523–525,[2] the members of the Senate Committee were aware of Congressman Waldie's purpose even before he addressed them. *Ibid.; id.* at 525–534. Indeed, on occasion, the bill was treated as if the addressee's statement that he found mail advertising sexually offensive were no more than a ritual incantation which he could make as to any advertising matter he no longer cared to receive, without check. *E.g., id.* at 528, 557–558, 567, 569–571. The Senate Committee Report on the bill, No. 801, *supra,* summarized the understanding evident throughout:

> * * * All the witnesses who testified before this committee agreed that the broader the coverage and the wider the extension to all types and classes of mail, the more solid was the constitutional foundation for the preventive procedure contained in the provision.

[2] Congressman Cunningham assured the committee that he had not opposed the Waldie amendment. *Id.* at 529.

> Under the provisions contained in title III, *the individual citizen is made the sole judge* of whether any advertisement he receives is a pandering advertisement; that is, one that offers for sale matter that to him is erotically arousing or sexually provocative * * *.
>
> If a person receives an advertisement which contains an offer to sell matter which he, in his sole discretion, believes to be erotically arousing or sexually provocative, he may notify the Postmaster General of his determination. The Postmaster General is then *required* to issue an order to the sender directing him to refrain from sending *any further mailings of any kind* to such person. * * *
>
> The committee believes the provisions of title III treat equally important, although sometimes conflicting, rights guaranteed by the Constitution in as fair and equitable a manner as possible. The Government should not restrict the right of free speech. At the same time, it should not act as the instrumentality by which unwanted and unsolicited mail matter is forced upon an unwilling citizen. * * * [At 38; emphasis added].

On the floor of the Senate, both during the initial debates and after a Conference Report, Senator Javits, in an explicit effort to make legislative history, stated that he believed there could be a *judicial* determination of the pandering quality *vel non* of objected-to advertising matter before an order of the Postmaster General was enforced.[3] 113 Cong. Rec.

[3] Senator Javits made no effort, however, to suggest that the Post Office had any role in judging the nature of objected-to advertising matter. Conceding that "the bill requires no find-

34230-34232, 36105. Senator Monroney, chairman of the reporting committee and manager of the bill on the floor, refused to be moved from his view, for the committee, that—

> the right of privacy provided a homeowner by the Fourth Amendment was controlling; that we have a right to mail this matter to him, but cannot repeatedly do so if the man finds it objectionable and, in the language of the bill, determines it is erotically arousing or sexually provocative. This is the language we put in the bill. *By no means do I think that anyone—I repeat, anyone—except the boxholder, in his home, has any control over what the latter considers objectionable.* He could go to the postmaster and say, "This is objectionable to me because of it being erotically stimulating," and so forth. *It does not have to be.* He can say, "Cabbage incites me, and I do not want any more cabbage direct mail delivered to my home." *I believe that the court would find, under the language of the bill, that he is the sole judge;* and the processes set forth by this amendment, which is identical to that of the House, would be that *no one could question his right of privacy because he objects to this type of mail coming from the sender.* He protests, so the sender is notified, and then the provisions of the bill go into operation, as ably described by the Senator. [At 34231; emphasis added.]

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ing," at 34230, he felt that if an *administrative* finding were required, "it would erect such a complicated structure of hearings, and determinations and trial examiners, and so forth—it would invite bureaucracy and litigation—that the practical aspects of the matter would be better handled by leaving the matter to the courts * * *." At 34231.

> The primary enforcement power is with the recipient of pornographic advertisements and material. All he need do is to say that the material is pornographic, in his judgment, and the Postmaster General must act to notify the mailer to take this man's name off that list and to never send any more mail to him. [At 36105.]

There was no other discussion of the provision.

ADMINISTRATIVE CONSTRUCTION OF THE STATUTE

The Post Office Department has taken a view of its role under the statute which draws on the congruity between Congressman Waldie's view of his amendment and the views expressed by the Senate Committee and its chairman and floor manager. While the rules of practice the Department has adopted to govern Section 4009 proceedings do not state what shall be the subject matter of administrative hearings or the sweep of the remedial order issued at its conclusion, it has published a pamphlet for public distribution and an administrative guide, both reprinted in the Appendix, *infra*, pp. 56–65 and 66–68, which show its views on these issues. In its first two paragraphs, the pamphlet states that—

> A family receiving a pandering advertisement which it finds offensive has authority under a new Federal law to ask that its members receive no more mail of any kind from the sender. * * *
>
> The individual mail patron is the sole judge of whether an advertisement is offensive to him. * * * [App., *infra*, p. 66.]

The administrative guide is as explicit:

> When determined that the patron [has submitted all necessary materials and requests for action], the mailing which the patron has characterized as a pandering advertisement must be examined to determine if it is, in fact an advertisement. It is important to emphasize, at this point, that the only question to be determined by the services center with respect to the offending mail piece is whether it constitutes an advertisement. The Department has no authority to review or question the patron's decision that the subject matter of the offending mail piece is erotically arousing or sexually provocative.
>
> * * * * *
>
> The Prohibitory Order issued under section 4009 * * * will direct the mailer of the pandering advertisement, effective thirty calendar days after the mailer's receipt of the Order, to make no further mailings of any kind to the persons protected by the Order. As stated, this prohibition extends to any and every type mailing, not just future pandering advertisements. [App., *infra,* pp. 59–60, 61–62.]

The prohibitory order forbids "any further mailings," without limitation. Appellants' Br., Exh. A.

Thus, in the Department's view, the only questions open for examination at the hearing provided for in the statute and regulations are: whether the mailing initially received and objected to was an "advertisement"; whether the objection was made in a proper form; and whether any mailing was made to the proscribed address (or whether any list bearing the

addressee's name was dealt in) after the effective date of the Department's order. While the Department has consistently stressed in its public statements regarding the scope of the law the connection with pandering and the requirement that the patron make a determination that sexual offensiveness is involved, it does not undertake to examine the bona fides of an objection once made. Accordingly, it has been possible for postal patrons to secure prohibitory orders against mail advertisers whose offerings they may not in fact have regarded as "erotically arousing or sexually provocative." It appears, however, that the *bona fides* of the great bulk of the complainants could not be questioned.

As of November 1, 1969, 368,868 requests for prohibitory orders had been received by the Post Office Department, and 291,340 orders issued, since inception of the statutory scheme.

JUDICIAL INTERPRETATION OF THE STATUTE

As of December 31, 1969, 2,121 complaints under the statute were pending in United States District Court, and 13 complaints had been acted on, almost entirely on default in favor of the government. No action has yet been filed against an advertiser whose materials could not reasonably be thought to be pandering within the statutory contemplation, although that is a matter of continuing discussions with the agency. All judicial orders entered to date have barred the sender from "any further mailings" to the recipients concerned, but no contempt proceedings have yet been brought to test the scope of that ban.

The only effort at judicial construction of the statute is that made by the court below in denying the requested injunctive relief. That court—a three-judge court in view of appellants' constitutional attack and effort to secure injunctive relief against the statute's operation, 28 U.S.C. 2284—divided in its reading of the statute.

Although they did not address the question directly, the majority appear to have read the statute's repeated reference to the "sole discretion" of the addressee as foreclosing any review function by the administrator or the courts over an addressee's determination that what he had received was a "pandering advertisement." The majority concluded, however, that the statute did not bar all future mailings, but only mailings of materials similar to those to which objection had been made. Once the addressee had determined what he found objectionable, it held, "all other proposed mailings are to be measured by the objectionable material of such first mailing" (App. 66–67). So read, the majority held that Section 4009 merely implemented the right of an individual to choose his own reading material and maintain "his own personal sensitivity and concept of privacy." (App. 64). Noting the elaborate procedural machinery established by the statute, the court rejected appellants' contention that Section 4009 deprived them of procedural due process. It dismissed appellants' argument that the expense of removing unwilling addressees' names from mailing lists rendered the statute confiscatory, and it found no unconstitutional delegation of power to addressees, since the discretion

conferred on them extends only to their own mail. The court also held that the statute was neither vague nor ambiguous, but gave ample warning to the sender of what he is prohibited from mailing to specified addressees. Finally, the district court concluded that injunctive relief would be inappropriate in any event, because appellants could show neither irreparable damage nor inadequacy of their remedies under the statutory procedure. Deciding that Section 4009 is constitutional and "provides an adequate forum" in which to litigate all of the issues of this controversy (App. 68), the district court dismissed the action.

The concurring judge was principally concerned that serious First Amendment problems might arise out of unfettered discretion on the part of addressees to insist upon not receiving mail from particular senders. In order to limit the statute to what she perceived as its purpose—enabling recipients to turn off the flow of *objectively* pandering commercial advertisements—she read a limitation into the district court's enforcement power. Although, in her view, the Postmaster General was required to do "no more than locate the sender and send to him the notice written by Congress" and then choose whether to seek enforcement of the order if violated (App. 76), a district court could not enforce the order unless shown that the matter complained of was "a commercial solicitation bearing on its face textual or graphic matter designed to appeal solely to the erotic interest of the addressee" (App. 77). She agreed with the majority that violation of that order could be committed only by the subsequent sending of similar materials

(App. 77–78). She found the act, so construed, constitutional.

SUMMARY OF ARGUMENT

The language of Section 4009, its legislative history, and its administrative interpretation all point to a construction considerably broader than that given it in the opinions below. Congress intended to confer, and effectively did confer, complete discretion on recipients of mail advertising to declare such advertising objectionable as "erotically arousing or sexually provocative" and to secure administrative and, if necessary, judicial relief against any further mailings of any kind to them by the sender. It did so to avoid what it perceived as serious constitutional objections to any effort by the Post Office to determine whether mail was or was not of the character described and, further, to get the Post Office out of the consorship business. The restriction against *any* further mailings was adopted, not only in view of the difficulty of determining whether subsequent mailings were of the same character as those which an addressee had formerly found objectionable, but also to avoid any appearance of prior restraint of particular ideas; the government was only enforcing the wish of the particular addressee to be free of further intrusions on his privacy by a sender whose advertisements he had once found objectionable. Thus construed the statute infringes no constitutional right of appellants.

The contention that the First Amendment requires judicial and administrative review of an addressee's determination that he has received a pandering adver-

tisement is answered, we believe, by the commercial context of the mailing involved and by the fact that the addressee blocks the mail only to his own home. It is well established that purely commercial advertising is subject to forms of regulation which might otherwise be forbidden by the First Amendment. In particular, "the exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity of the fireside." *Breard* v. *Alexandria*, 341 U.S. 622, 627. There is no question but that appellants' material is of a purely commercial nature. Congress properly determined that, as to such material, a recipient's right to refuse to have it delivered to his house outweighs any First Amendment interest of the sender in imposing it upon him. That judgment is particularly apt in the present context, where the advertisements involved are offensive, where their offensiveness cannot be discovered and avoided prior to their inspection, and where children may reach the material first, before their parents can screen it from them.

Since the individual is empowered to determine only what enters his own mail box, and in view of the recognized complexity of any objective test of obscenity or pandering, Congress was well within constitutional bounds in enabling the recipient to judge for himself what matter offends his sensibility. Should the Court fear, however, that the statute makes it too easy for individuals to interfere with commercial mail which is not, even in their eyes, pandering in nature, we suggest that that possibility can be guarded against without the need for administrative or judicial determination of pandering. It would be sufficient to re-

quire that an inquiry be made, preferably at the judicial level, into the good faith of an addressee's claim that the mail he objected to offended him for the reasons set out in the statute. Such a construction would curb misuse of the statute, without requiring the judicial and administrative proceedings, and the second guessing of recipient tastes, which Congress so clearly wished to avoid.

Nor do we think the prohibition on further mailings must be limited to mailings which are pandering in fact, or which are similar to those which first gave a recipient offense. Any ban on a commercial mailer's further mailings to a particular address will in practice result in a cessation of all further mailings—at least those mailings for which lists are used—rather than the inception of a discretionary selection process. This fact, and the substantial administrative conveniences involved, together justify the sweeping ban. Again, it is important that what is involved is the voluntary statement of one recipient that he does not wish to receive mail again from a particular sender. There is no general ban of any kind. If a narrowing construction is nonetheless necessary, we believe all legitimate objections would be answered, and the congressional purpose least disserved, by a limitation of the prohibition on further mailings to those which advertise matter for sale.

In response to petitioner's further contentions, we show that the requirement that a sender delete the names of complaining addressees from all his mailing lists effectuates the further mailing provisions and denies no constitutional right; and that Section 4009

provides for procedures which comport with due process of law.

Even should this Court find constitutional doubts which compel it to a construction of the statute narrower than we have urged, we stress our view of the statute's history that, whatever else might be required, to construe the statute as involving an *administrative* determination of pandering or a test of permissible further mailings which would depend upon the material initially found objectionable, would be an unacceptable reworking of the statutory scheme.

ARGUMENT

I. THE STATUTE SHOULD BE CONSTRUED TO FORECLOSE ANY FURTHER MAILINGS BY A SENDER TO AN ADDRESSEE WHO HAS ONCE ASKED THAT MAILINGS TO HIM BE CEASED AFTER RECEIVING AN ADVERTISEMENT WHICH HE BELIEVES TO HAVE OFFERED MATERIAL OF A SALACIOUS NATURE

The legislative history set out above makes clear the view both of the author of Section 4009 and of the Senate Committee which carefully studied it that the section makes the individual receiving mail "the sole judge whether any advertisement he receives is a pandering advertisement," and then requires the sender "to refrain from sending any further mailings of any kind to such person."[4] S. Rep. No. 801, *supra,*

[4] The government's Motion to Affirm, perforce, accepted the construction of the court below that only future mailings of "pandering advertisements" were prohibited. At 4, 8, 9. In view of the administrative difficulties of that limitation in the context of discretionary, individual determinations of what

p. 38. Indeed, in the limited floor debate in the Senate, Senator Javits, the only vocal critic of the provision, readily conceded that this was the thrust of the legislation, and that the Post Office should not be burdened with administrative determinations of any kind regarding the pandering quality of initial or subsequent mailings, 113 Cong. Rec. 34231. He simply expressed the view that when the time came for judicial enforcement or the application of contempt sanctions, attention might *then* be paid to whether or not pandering had occurred. *Ibid.; id.* at 36105. In the House, Congressman Waldie made clear that under his amendment the addressee complaining of mailed advertisements was not to be "second-guessed," and that his complaint would "prevent that man from making any further mailings." *Id.* at 28660. His amendment was adopted without change; he never retracted that view.

As so often happens in the process of amendment, however, minor ambiguities were left in the statute. Section 4009(a) refers to a "*pandering* advertisement which offers for sale matter which the addressee

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constitute pandering advertisements, and in light of the conclusion reached on further study of the legislative history that Congress virtually foreclosed even judicial determination of that question, the government has concluded that it can no longer advance that limitation as part of its primary argument. It would be appropriate only if this Court determined that judicial review of the pandering issue were required—a limitation which, for the reasons set out in the text, pp. 37–41 and 50–52, we are most reluctant to accept. The government opposed limitation of the "further mailings" language in the court below. *E.g.*, App. 45. It does concede, *infra*, p. 45, the possibility of a limitation to further mailings of *advertisements*, whatever their nature.

in his sole discretion believes to be erotically arousing or sexually provocative," and it might be argued that the qualifying clause does not govern the word "pandering"—that is, that "pandering" as much as "advertisement" constitutes an element which must be administratively determined before an order can be issued. Similarly, although Section 4009(b) forbids "further mailings" and 4009(c) "any further mailings" to an addressee under an order, Section 4009(a) states that the sender "shall be subject to an order * * * to refrain from further mailings of such materials * * *." From this it might be argued that only mailings of materials such as the addressee has determined to be pandering are forbidden. Yet either argument, if accepted, would appear to require the very same administrative proceedings which the legislative history shows beyond doubt Congress wished to avoid. As we now show in some detail, both arguments should be rejected.

A. "PANDERING ADVERTISEMENT"

In adopting the Waldie amendment, the House chose against the reported bill, which would have required the Postmaster General to determine whether a particular mail item was "of the character of a pandering advertisement" before issuing any order. H. Rep. No. 722, *supra,* at 69. In the Senate, critic and sponsor alike agreed that "the bill requires no finding on the part of either the Postmaster General or the court that the material is actually 'erotically arousing or sexually provocative'," and that it would be impractical and undesirable to import any element of Post Office censorship into it. 113 Cong. Rec.

34230–34231. The statute itself repeats the reference to "sole discretion" in Section 4009(b) without a separate mention of pandering. It could not be clearer that, in congressional contemplation, the individual was made "the sole judge of whether any advertisement he receives is a pandering advertisement." S. Rep. 801, *supra,* p 38.

Indeed, if the statute were read to require an administrative determination of pandering, that would substantially defeat the "sole discretion" conferred on addressees by the following clause. For the term "pandering" itself connotes sexual elements, see *Ginzburg* v. *United States,* 383 U.S. 463; were the administrator to determine "pandering" this would involve him in the very type of censorship proceedings Congress wished to avoid—as well as in bureaucracy and litigation which would be crushing in view of the volume of orders sought. No such self-defeating interpretation is required. As in fact is done under the Post Office Administrative Guide, *supra,* p. 13, the word can be read as underlining the commercial context in which the solicitation must take place to be objectionable under the statute. So read, the statute avoids internal inconsistencies and carries out the congressional purpose.

To be sure, Congress was concerned with offensive sex-related materials when it enacted Section 4009. But Congress understood that individual tastes and judgments would differ on such questions, that one

man's salaciousness might be another's sustenance. The intention was to allow scope for these differences of background and taste to express themselves. See, *e.g., Senate Hearing,* p. 548. In keeping with the individualized remedy of Section 4009, Congress sought to prevent postal officials from sitting "astride the flow of mail * * *." *Lamont* v. *Postmaster General,* 381 U.S. 301, 306. It knew that some addressees might exercise their discretion perversely or unreasonably to screen out materials having scant relation to sexuality. Cf. 113 Cong. Rec. 28659–28661, 34231 (1967); *Senate Hearing,* pp. 525–528. It was even suggested that conferring sole discretion on the addressee risked abuses that might affect the efficiency of the Post Office. *Senate Hearing,* p. 558. But Congress preferred to take the chance that some addressees would reject mail matter falling outside the narrow ambit of the legislative purpose than to adopt a scheme that would involve local postal officials in reviewing addressees' determinations of what did and did not intrude upon their privacy. It chose what it judged to be a less restrictive, less uncertain and less bureaucratic alternative.[5]

[5] Even after the sole discretion amendment had passed the House, there were still proposals that more comprehensive schemes of regulation be adopted. It was, for example, suggested that a more effective way of handling the problem would be to institute a system of licensing of mailing list brokers, including license revocation for those brokers who sell their lists to dealers in pandering materials. Testifying before the Senate committee considering the bill, Congressman Waldie conceded that such a scheme would probably be more effective than

B. "ANY FURTHER MAILINGS"

Like the sole discretion provision, the "further mailing" provision was amended on the floor of the House. The original bill reported by the House committee prohibited "further mailings of such pandering advertisements" in Section 4009(a), "further mailings of such matter" in Section 4009(b), and "any further mailings of pandering advertisements" in Section 4009(c). H. Rep. No. 722, 90th Cong., 1st Sess., pp. 125–126 (1967). The floor amendments which were adopted modified those subsections in the following way. Section 4009(a) now speaks of "further mailings of such materials," Section 4009(b) of "further mailings", and Section 4009(c) of "any further mailings." The explicit intention of the author of these amendments, Congressman Waldie, was "to prevent that man [the sender] from making any further mailings to you * * *." 113 Cong. Rec. 28660 (1967). Undoubtedly, these amendments were intended to harmonize better with the sole discretion provision than the original language would have, for Congressman Waldie added: "but the sole determination as to whether the literature you receive is objectionable or

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the individual remedy afforded by Section 4009, but he stressed the constitutional problems presented by such an approach:

"* * * I think every objection you point out as to the difficulty of enforcing this is a proper one, but it seems to me at least the only method that has been presented to the Congress that does not get into first amendment questions and, as awkward and inefficient as it might be, it offers at least an opportunity to determine whether it will work."

Senate Hearing, p. 533, see *id.*, pp. 532–534. For other alternative schemes, rejected for similar reasons, see *id.*, p. 522; *House Hearing*, pt. I, p. 8.

not is within your discretion and you are not second-guessed on that discretion." *Ibid.*

The seeming conflict between the present subsection (a) and subsections (b) and (c) is merely a residue of the earlier wording. Subsection (a) was not intended to permit any subsequent inquiry into whether mailings which occurred after the effective date of the prohibitory order were similar in kind to the initial offensive mailing. The Senate committee which considered the bill after it had been amended and passed by the House understood that the statute was intended to prohibit, in the committee's words, "any further mailings of any kind" to a complaining addressee. S. Rep. No. 801, 90th Cong., 1st Sess., p. 38 (1967).

The relationship between the "further mailings" problem and the "pandering advertisement" must also be borne in mind. For if, as we have shown, the determination whether an advertisement is pandering or not rests solely with the recipient of the mail, a construction of "further mailings" to apply only to similar materials would make enforcement proceedings bizarre. There would then be no rational way to decide whether further mailings had the same vice as had led the recipient to object initially.

> If a mailer were prohibited only from sending materials the addressee regarded as offensive, the mailer would be confronted with an impossible standard—the totally subjective and nonreviewable standard of the addressee. It would be impossible for the mailer to guess the subjective feelings of the addressee. Under the prohibition provided in title III [*i.e.*, Section

4009], the mailer has no such problem. He simply knows he can't send anything at all to that addressee.

Senate Hearing, p. 545 (testimony of Timothy J. May, General Counsel, Post Office Department). And again, the necessity for such determinations would require the creation and funding of an elaborate administrative machinery which Congress never meant to establish. Quite the contrary: Congress expressly preferred the clarity and simplicity of the present procedure to a burdensome scheme of administrative censorship. Under the Post Office interpretation of Section 4009, *any* further material sent to the complaining addressee, thirty days or more after receipt of the order by the sender, violates that order. The order is plain, enforcement is uncomplicated, and the issues at the hearing (if any) are clearcut.

Finally, Congress must have understood that in practice a prohibition only of similar mailings would in fact operate as a prohibition of all further mailings. This point may be illustrated by the affidavit of the appellant LeJay Winkler, d/b/a Quality Products (App. 22–25). Since Section 4009 became effective, Quality Products has rented 111 mailing lists, with a total of 410,345 names, and has received approximately 1,000 prohibitory orders under the act (App. 22). Quite obviously, the only practical way for Mr. Winkler and Quality Products to proceed is to excise the approximately 1,000 names involved from all further mailings, by deleting the names from his lists. He simply cannot make 1,000 individualized determinations, for each of his future mailings, as to whether it

is or is not "similar" to the mailing that prompted the individual addressee to request a prohibitory order. Appellants have never suggested a limiting construction of the "further mailings" provision; and with the limited exception noted within, p. 45, any such construction would make no practical sense.

II. THE FIRST AMENDMENT DOES NOT REQUIRE JUDICIAL OR ADMINISTRATIVE REVIEW OF AN ADDRESSEE'S GOOD FAITH DETERMINATION THAT A COMMERCIAL ADVERTISEMENT HE RECEIVES THROUGH THE MAIL OFFERS FOR SALE "EROTICALLY AROUSING OR SEXUALLY PROVOCATIVE" MATTER

A. PURELY COMMERCIAL ADVERTISEMENTS, OF WHATEVER NATURE, ARE SUBJECT TO FORMS OF REGULATION WHICH MIGHT OTHERWISE BE FORBIDDEN BY THE FIRST AMENDMENT

No prohibitory order may issue under section 4009 unless there is a request from an addressee who has received a "pandering *advertisement which offers for sale* matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative * * *." § 4009(a) (emphasis supplied). For the reasons already shown, Congress granted the addressee sole discretion to judge the offensiveness of the advertisement and the matter it offered for sale, including the issue of "pandering." But whether there has been an advertisement offering matter for sale is an objective question, which the postal authorities are granted power to decide and do decide before any order is issued. *Supra*, p. 13. The statute thus applies only when there has in fact been a commercial solicitation. It does not apply to the mailing of books, pam-

phlets, pictures or other traditionally protected written materials. Nor does it apply to political or religious tracts, even if they are accompanied by a request for a donation.

It is well established that "purely commercial advertising" is subject to forms of regulation which might otherwise be forbidden by the First Amendment. *Valentine* v. *Chrestensen,* 316 U.S. 52, 54. See *Breard* v. *Alexandria,* 341 U.S. 622, 641–642; *Ginzburg* v. *United States,* 383 U.S. 463, 474, n. 17. Of course, we do not content that the First Amendment can have no application whatever to advertising. Advertising may be a means of editorializing, *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265–266, or of proselytizing, *Jamison* v. *Texas,* 318 U.S. 413, 416–417, and in such circumstances it would be constitutionally protected. But there is no suggestion either that appellants' material falls into those categories or that an advertisement that merely advocates an idea would be within the purview of the act, since only an offer of sale may bring on a prohibitory order. The appellants are businessmen, not political, social or religious pamphleteers. Whereas it is important to protect the latter in seeking out determined opponents of their views for the purpose of persuasion, commercial vendors are more likely to continue their offensive solicitations only because of the inconvenience or cost of removing the names of

those who have objected to their materials from their lists.[6]

It is precisely this unconcern for the sensibilities of recipients that Congress sought to mitigate when it enacted Section 4009. The distinction between protected speech and purely commercial advertising is particularly compelling under these circumstances. For "the exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity of the fireside * * *." *Breard* v. *Alexandria,* 341 U.S. 622, 627. "[O]pportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as * * * a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose." *Id.* at 625–626.

B. CONGRESS PROPERLY DETERMINED THAT, IN THE CONTEXT OF PURELY COMMERCIAL ADVERTISING, A RECIPIENT'S RIGHT TO REFUSE MATTERS HE DOES NOT WISH DELIVERED TO HIS HOME OUTWEIGHS ANY FIRST AMENDMENT INTERESTS OF A SENDER IN IMPOSING THOSE MATTERS UPON HIM

The history of Section 4009 makes plain that Congress was engaging in a deliberate balancing of mail recipients' interests in privacy from unwanted mail against mail senders' interests in imposing that mail upon them. Acting to effectuate "the right to be let

[6] Congress was aware of the difficulty that addressees frequently experience when they attempt to have their names removed from mailing lists of purveyors of undesirable material. See, *e.g.*, *Senate Hearing*, pp. 516–517; *House Hearing*, pt. II, p. 71. As their affidavits indicate (App. 17–25, 36–38), appellants here are primarily concerned with avoiding the expense of deleting names of complaining addressees from their lists.

alone—the most comprehensive of rights and the right most valued by civilized men," *Olmstead* v. *United States,* 277 U.S. 438, 478 (Brandeis, J., dissenting), those who prevailed believed that, in this commercial context, the interests of recipients outweighed those of senders without any need to impose a further objective safeguard on the types of materials to which objection was made. *E.g.,* 113 Cong. Rec. 34231–34232, 36105; S. Rep. No. 801, *supra,* at 38. That assessment was correct.

In making the assessment, Congress was of course aware that the freedoms of speech and press embrace the rights necessary to effectuate those freedoms, including the right to circulate and receive publications, the right to listen and the right to read. *Stanley* v. *Georgia,* 394 U.S. 557, 564; *Martin* v. *City of Struthers,* 319 U.S. 141, 143; *Ex parte Jackson,* 96 U.S. 727, 733; *Lamont* v. *Postmaster General,* 381 U.S. 301, 308 (Brennan, J., concurring). But it also recognized that "[w]hen expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees." *Ginsberg* v. *New York,* 390 U.S. 629, 649 (Stewart, J., concurring). One's interest in being let alone is greatest in "the privacy of one's own home." *Stanley* v. *Georgia,* 394 U.S. 557, 565. Accordingly, Congress sought to insure that no one need be subjected to unwanted vulgarities in his mailbox.

The freedoms secured by the First Amendment do not guarantee the writer or speaker a willing recipient, a friendly audience or a receptive reader. *Schneider*

v. *State,* 308 U.S. 147, 160. This Court has never questioned the right of a person in his own home to decide what not to listen to and what not to read. On the contrary, while zealously protecting the right to speak, this Court has also been solicitous of those who prefer not to listen. Thus, in *Kovacs* v. *Cooper,* 336 U.S. 77, a local ordinance forbidding the use of amplifiers emitting "loud and raucous noises" on the public streets was sustained, on the ground that it protected the "unwilling listener" who at "home or on the street * * * is practically helpless to escape this interference with his privacy * * *." 336 U.S. at 86–87. Similarly, in *Breard* v. *Alexandria,* 341 U.S. 622, this Court upheld an ordinance prohibiting uninvited door-to-door solicitation of magazine subscriptions on the ground that it was designed to protect residents against uninvited intrusions into the privacy of their homes. 341 U.S. at 625.

To be sure, there are limits on the right of a legislature to safeguard the privacy of all despite the wishes of some who might prefer to hear the speaker's message at their door. See *Martin* v. *City of Struthers,* 319 U.S. 141, and the dissenting opinion in *Breard,* 341 U.S. at 649–650. But *Martin* and *Breard* both make it clear that a statute may, without offending the First Amendment, forbit solicitation which the homeowner or resident has refused in advance.[7]

[7] Thus, the opinion of the Court in *Martin* stated that "the decision as to whether distributers of literature may lawfully call at a home" must be left "where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant * * *." 319 U.S. at 148.

Section 4009 does not go as far as the ordinance sustained in *Breard*. It makes no decisions for the community at large. It only permits individual mail recipients to choose their and their children's reading matter and enforces their decisions to receive nothing more from a particular sender who has mailed them advertisements which they find as individuals to be pandering materials which are "erotically arousing or sexually provocative." As this Court suggested in *Martin*, Section 4009 leaves the decision to accept or reject the material "with the homeowner himself." 319 U.S. at 148.

The infringement of privacy associated with advertisements which recipients perceive as pandering goes beyond the "nuisance, or worse, to peace and quiet" found in *Breard*. 341 U.S. at 627. Besides the effect of such publications on the young, Congress found that such advertisements—tasteless at best, obscene at worst—had often proved extremely upsetting to recipients. (See *supra*, pp. 5–6). And equally with the door-to-door peddler, such advertisements often arrive "in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U.S. 767, 769.[8] Frequently

[8] The Congress learned that many such advertisements are not readily identifiable as third class items, but are sent instead by first class mail. *Senate Hearing*, pp. 534, 542, 550, 570. This factor of confrontation is one important distinction between this case and *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y.), on which appellants heavily rely. Equally important is the distinction noted by the court below, App. 63: *Lamont* was an effort to enjoin the sale of an entire list, without regard to whether individuals on it did or did not

there is the risk that children will reach the material first.[9] In these circumstances, Congress was well within the bounds of permissibility in concluding that this was a concern that warranted redress.

The fact that Section 4009 is directed at assaults on privacy in the recipient's home is constitutionally significant. Compare *Camara* v. *Municipal Court,* 387 U.S. 523, 530–531, with *See* v. *City of Seattle,* 387 U.S. 541, 545–546. Outside the home it is reasonable to expect that, whatever precautions they may take, individuals will necessarily be confronted with a variety of aural and visual stimuli they find distasteful. Any attempt to shape the public environment to suit an infinite variety of tastes is bound to be futile. But implicit in the concept of a home is a range of choice greater than an individual possesses on the streets or in other public places. There the wishes of a sensitive individual may be accommodated without undue inconvenience to the interests of others. Compare *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451.[10]

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wish to receive the mail which would be sent to them; "[h]ere we are concerned with a statute that proscribes mailings to an *unwilling* recipient *only*."

[9] The purpose to "afford parents a means to stop this material from reaching their children through the U.S. mails," H. Rep. No. 722, *supra*, at 68, was central to this legislation. That purpose is plainly legitimate, *Ginsberg* v. *New York*, 390 U.S. 629, and the means adopted are reasonably calculated to implement it.

[10] "Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires." Chafee, *Free Speech in the United States*, 406 (1941), quoted with approval in *Breard* v. *Alexandria*, 341 U.S. 622, 639, n. 27.

The individual's freedom to control the flow of reading matter into his home—protected from governmental regulation by

C. THE BREADTH OF DISCRETION VESTED IN THE ADDRESSEE IS CONSISTENT WITH THE FIRST AMENDMENT AND DUE PROCESS

No excessive discretion is vested by Section 4009. The addressee is only empowered to determine what enters his own mailbox. His judgments have no general social effect.[11] The constitutionally protected rights of willing recipients are unimpaired by Section 4009. They are put under no burden of action or self-identification to receive the mail they desire. Cf. *Lamont* v. *Postmaster General,* 381 U.S. 301. The sole discretion conferred on the addressee merely pro-

Stanley v. *Georgia*, 394 U.S. 557—"is also impaired when unwanted obscenity is thrust upon him. Thus a corollary of the 'right to receive' obscene material may be the interest in avoiding undesired contact with it * * *. An attribute of privacy—just as of the 'right to receive'—is the ability to control one's personal environment. Unwanted intrusions violate one's privacy." Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 62, 152 (1969). See also *Williams* v. *District of Columbia*, No. 20,927, decided June 20, 1969 (C.A.D.C.), referring to "verbal assault" as the gravamen of a public profanity charge; and *United States* v. *Klaw*, 350 F. 2d 155, 163–164 (C.A. 2), stating that obscene "material and conduct may also sometimes be suppressed and penalized because, like a common law nuisance, it constitutes an unreasonably offensive intrusion into the lives of persons, who cannot reasonably avoid it."

[11] The cases relied on by appellants as showing excessive delegation are thus readily distinguishable. *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, involved a delegation of legislative authority to the President, which violated the separation of powers. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311, conferred power on a majority "to regulate the affairs of an unwilling minority." No such grant of power can be found here. See *Currin* v. *Wallace*, 306 U.S. 1, 15–16; *Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529–531. If anyone seeks to dictate to unwilling minorities, it is the appellants in this case. Neither is there any problem of reviewing official action. Compare *Arizona* v. *California*, 373 U.S. 546, 626 (Harlan, J., dissenting in part). The addressee acts for himself, and his decision is final.

tects "the sensibilities of the unwilling recipient," *id.* at 310 (Brennan, J., concurring), in an area in which those sensibilities are subject to recurrent and blatant offense.

Furthermore, the complexities of defining and identifying obscenity and pandering are well known to this Court. *E.g., Jacobellis* v. *Ohio,* 378 U.S. 184. Judges have often divided on these issues. The statutory purpose could well be lost in an administrative and judicial maze if each addressee were compelled to defend, and each sender allowed to challenge before the Post Office and the courts, the addressee's determination that a mailing was sexually offensive. Given the problem of drawing fine lines in an area so subjective, it was eminently reasonable for Congress to leave the final judgment to each addressee.

One of the most important justifications for the regulation of obscenity is the "nuisance" or affront that it constitutes for the sensitive and captive viewer. Thus the determination of affront ought to be left to individual discretion, where that is possible without impinging on the free circulation of ideas. That course is possible in the mails as it is perhaps nowhere else. As this Court pointed out in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503, each method of dissemination presents "its own peculiar problems" and lends itself to different techniques of regulation. See also *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 386–387; *Times Film Corp.* v. *City of Chicago,* 365 U.S. 43, 49. Unlike other methods of dissemination, the distribution of obscene or pandering materials by mail is uniquely conducive to individual control and

variable standards of offensiveness. Cf. *Ginsberg* v. *New York*, 390 U.S. 629.

In sum no right of the advertiser to free speech is violated by an individual's discretion to secure from the Post Office a mail stop order, upon showing that he has received a commercial advertisement which he declares to be pandering in character. Indeed appellants do not seriously contend that the alleged infringement of free speech is to be found in the sole discretion provision of the statute. They argue only that if the discretion had been "granted directly to the Postmaster General," the statute would violate the First Amendment. Brief for the Appellants, pp. 18–19. But for that reason the power was not granted to the Postmaster General, and no such problem arises.

D. THE POSSIBILITY THAT THE STATUTE WILL BE USED BY PERSONS WHO DO NOT BELIEVE IN GOOD FAITH THAT THE ADVERTISEMENTS THEY RECEIVE PANDER TO INTERESTS IN EROTIC AROUSAL AND SEXUAL PROVOCATION CAN BE GUARDED AGAINST, IF NECESSARY, WITHOUT THE NECESSITY FOR ADMINISTRATIVE OR JUDICIAL DETERMINATIONS OF PANDERING CONTENT

The legislative history indicates that Congress accepted the possibility that some mail recipients would use Section 4009 to avoid mail from advertisers whom they did not genuinely believe to have been pandering as such. Nor would there be constitutional objection to a statute which extended the mechanism of Section 4009 to all commercial advertising mail, without regard to its possible relation to obscenity. Mailers have no right to force their commercial advertising materials on members of the public who have already seen them once and decided to accept no more, any more

than "a group of distributors could * * * insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet * * *." *Schneider* v. *State*, 308 U.S. 147, 160. This Court has "never intimated that the visitor could insert a foot in the door and insist on a hearing." *Kovacs* v. *Cooper*, 336 U.S. 77, 86.[12]

It is nonetheless true that this statute was adopted with the evils of pandering of sexually oriented materials particularly in mind, so that its extension to other areas on the legislative findings actually made is supported chiefly by considerations of workability and convenience. Moreover, decisions such as *Ginzburg* and *Redrup, supra,* suggest that the constitutional justifications for a pandering statute may be somewhat stronger than those for a statute directed to advertisements generally. And, use of the pejorative term "pandering" in notices and enforcement proceedings might appear unjustified as against businessmen whose advertisements were in fact being objected to for some other reason. These factors are among those which appear to have led *amicus* Direct Mail Advertising Association to argue that the statute's application must be limited to advertisements which are or reasonably could be thought to be pandering in fact.

[12] It bears repetition that unlike such cases as *Manual Enterprises* v. *Day*, 370 U.S. 478, this is not a case where the offense an advertiser gives to the few or to the many will result in a complete ban on his use of the mails. Rather it balances the expressed desire of a recipient to be left alone against the sender's claim of right to intrude himself *on that recipient*, solely for reasons of commercial gain.

We note, first, that appellants have not shown that their material cannot be regarded as "pandering," or that the persons who applied the "pandering" label to them did so in bad faith. There is no basis for such a contention in this record. Cf. App. 21, 28. If their materials in fact do fall within the "hard core" of materials recipients could believe to be pandering, it would be unnecessary now to resolve questions regarding the application of the statute to other materials. *Dombrowski* v. *Pfister,* 380 U.S. 479, 491–492. It seems unlikely that the members of the Direct Mail Advertising Association will be "chilled" in their selection of advertising copy by the possibility that a few recipients, for their own purposes, will object to it as pandering.[13] Moreover, they may well have a private tort remedy for any damages caused by the sting of a false accusation of pandering recklessly or maliciously made.

If the question is here, a much less drastic limitation on the statute will answer the complaint of the *amicus* without either eliminating the addressee discretion which was such a central feature of the proposed regulatory scheme or requiring the administrative and judicial determinations of pandering content which Congress was determined to avoid. The less drastic limitation would be to permit the judge to refuse enforcement of a Post Office order if he determined that the complainant did not in good faith

[13] Even undoubted panderers will feel no pressure to change the content of their speech; the only effect of the act is to compel them to be more scrupulous of the wishes of particular addressees not to receive their circulars.

object to an advertisement on the ground that it was pandering material offering erotic arousal or sexual provocation. That is, just as the statute requires that there be an advertisement offering matter for sale before an order can issue, it also could be said to require a determination in fact by the addressee that the advertisement panders salacious goods. Thus, where an advertisement has no apparent pandering content, a court may look behind the addressee's formal complaint to discover whether he in fact made in good faith the determination the statute calls for. Congress meant to enable citizens to exercise their own judgment regarding what was sexually provocative to them, however strained that judgment might seem; although it appears to have accepted the prospect, it had no purpose to allow them to use the statute for other purposes, under the cover of a mere formal statement.

The limitation we suggest would require no judicial or administrative determinations of pandering content. Ordinarily, it could be determined from the face of the advertisement complained of, together with the public statement of the addressee, that the required judgment had been made. There would be no occasion for further inquiry unless the nature of the advertisement gave reason to doubt the addressee's statement in his complaint that he has determined it to be pandering in character. Moreover, we suggest that any inquiry be confined to the judicial enforcement proceedings. No official sanction attaches before that stage; the question is not one which requires the particular expertise of the Post Office, but is if any-

thing more suitable for resolution in a court, which is able, *inter alia,* to compel the presence of witnesses; it is clear Congress wished to avoid drawn out administrative proceedings; and the fact that the Postmaster General and Attorney General are merely "authorized" to seek judicial enforcement, § 4009(d), suggests the exercise of a discretion on their part which would make the occasions for such hearings, and consequent disruptions of the congressional scheme, few.[14]

III. THE PROHIBITION OF "ANY FURTHER MAILINGS" OFFENDS NO CONSTITUTIONAL SAFEGUARDS

In support of their contention that the further mailing provision runs afoul of the First Amendment as a "prior restraint" on speech, appellants cite only *Walker* v. *Popenoe,* 149 F. 2d 511 (C.A.D.C.). That case involved an order of the Postmaster General excluding a particular pamphlet from the mail for obscenity. The court of appeals found that the pam-

[14] A similar limiting effect might be achieved by permitting review of an addressee's determinations for "abuse of discretion," refusing enforcement where discretion had been misused or where the court determined that no reasonable man could find the objected-to advertisement to have pandered to the taste for erotic arousal and sexual provocation. But a limitation so stated differs from that suggested in the text, in that it involves the courts in an objective determination of what may or may not be pandering and to that extent frustrates the congressional choice. Congress meant addressees to be free to defend their own views of pandering in their own homes, however unreasonable those views might appear. Compare *infra*, pp. 51–52.

phlet was not obscene, and held that in any event it could not be excluded from the mail without a hearing. The exclusion in *Walker* was from the mail generally, not merely from the mail of a particular addressee who had declared his unwillingness to receive the pamphlet. *Walker* has no possible application to Section 4009.

The vice that the appellants find in the further mailing provision is that it prohibits the sender from mailing anything else to the complaining addressee, regardless of the content of the subsequent mailing. In fact, however, in the context of this statute it is unlikely that even the most limited prohibitory order would result in anything less than the termination of all mailings to an addressee who requests such an order. Since appellants complain even of the expense of removing addressee's names from their mailing lists, it is improbable that they or other advertisers would adopt a procedure of picking and choosing which materials shall be sent to particular individuals, were the statute to permit certain types of further mailings but not others.

This point underscores the validity of regulation of commercial advertising which might in other contexts raise constitutional questions. See pp. 28–30, *supra*. The Act provides that a prohibitory order may issue only at the request of an addressee who has received a commercial advertisement. Congress knew that a commercial mailer who had received a prohibitory order would have scant interest in continued mailings to the same addressee except perhaps to avoid the inconvenience of removing the name from a mailing

list. Furthermore, any further mailing that occurs is likely to be a commercial solicitation. It is a matter of common knowledge that the only mail matter that ordinarily follows upon one advertisement to which there has been no affirmative response is another advertisement.

There is further reason in the structure of the industry principally affected to conclude that the statute does not have the effect of screening out the innocuous and the informative along with the indecent. Pandering is a specialized business. The evidence before Congress was that most of the complaints which gave rise to the statute "pertain to the indiscriminate mailings of a relatively few nationwide dealers." *House Hearing,* pt. II, p. 70. The operations of one dealer alone were responsible for more than 100,000 complaints to the Post Office Department in a four-year period. *Id.*, p. 71. There was no doubt in the evidence before Congress that the vast majority of pandering advertisements emanate from a few mail order houses specializing in this type of material. *Id.*, pp. 69–72.[15] Given the specialized nature of the pandering trade, Congress was justified in concluding that a prohibition of all further mailings to a complaining addressee would not result in an appreciable diminution of inoffensive material. This is a significant point when one balances against it the high financial and administrative costs entailed in establish-

[15] The record in the instant case is consistent with this conclusion. The affidavits appended to the complaint show that within only six months of the enactment of Section 4009, the appellants received between 7,000 and 10,000 prohibitory orders (App. 17–38; see Brief for the Appellants, p. 7).

ing the machinery that would be required if the further mailing provision had been drafted differently, as well as the significant burden that would be cast on the judiciary of reviewing thousands of administrative determinations as to the sexual offensiveness of further mailings.

Of course, we recognize that legislation in the area of free expression must be narrowly drawn. *Shelton* v. *Tucker*, 364 U.S. 479; *Talley* v. *California*, 362 U.S. 60; *Lovell* v. *City of Griffin*, 303 U.S. 444. But we stress again that this statute requires only the exclusion of mail from particular senders to particular addressees, who have firmly and formally stated their desire to receive no more, and does not involve a general ban of the mails. The addressee has made his individual choice to accept nothing further from a particular sender. There is every difference between an individual decision of this kind and a determination of general applicability that a certain sender may no longer use the mail.[16]

[16] *Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42 (C.A. D.C.), cited in the concurring opinion below, is inapposite for precisely this reason. The court in *Sunshine* held that the Postmaster General was not authorized to exclude from the mail all future issues of a magazine found on previous occasions to contain some obscene illustrations, but was authorized to exclude only already-published magazines duly found to contain obscene materials. The distinction between preventing the circulation of all future issues of a magazine, regardless of content and regardless of the desire of readers to receive it, and preventing further mailings to individual addressees who do not wish to receive them is plain. In the one case, free circulation is cut off at the source. In the other, free circulation continues, subject to decisions of individuals to except themselves.

If it is nonetheless necessary to narrow somewhat the statutory proscription of any further mailings, we believe all legitimate objections would be answered and the congressional scheme least disserved by a limitation of the prohibition to all further mailings of commercial advertisements offering matter for sale. As we have shown at some length above, a limitation of the prohibition to further mailings of objectively pandering materials would frustrate the congressional decisions to permit the addressee's (good faith) determination to control and to avoid extensive administrative and judicial inquiry. A limitation to further mailings like those which an addressee had initially found pandering would introduce intolerable uncertainty and complexity. Limiting the "further mailings" provision to further mailings of advertisements offering matter for sale, on the other hand, would involve neither subjectiveness or administrative proceedings. It would eliminate the possibility, remote in any event, that the order might be applied to personal correspondence, political tracts, or other matters far beyond congressional contemplation, at the cost of only a slight risk that the protesting addressee would continue to be offended.

IV. APPELLANTS' OTHER CONSTITUTIONAL OBJECTIONS LACK SUBSTANCE

A. THE REQUIREMENT THAT A SENDER DELETE THE NAMES OF COMPLAINING ADDRESSEES FROM ALL HIS MAILING LISTS EFFECTUATES THE "FURTHER MAILING" PROVISION AND DENIES NO CONSTITUTIONAL RIGHT

Section 4009(c) provides that a prohibitory order shall "direct the sender and his agents or assigns to

delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees."

The purpose of this provision is to insure that the addressee's wish to receive no further mailing is respected. The evidence before Congress indicated that there were essentially two kinds of mailing lists used in the pandering trade—random lists and "prime lists":

> List dealers and brokers compile lists of persons with an indicated susceptibility to certain product appeals or otherwise bring a mailer in contact with such a list. These lists are then obtained under a sale, rental, or exchange transaction by firms desiring to advertise particular products. Detailed records are kept and list prices rise or fall commensurate with the response ratio experienced.
>
> Smut dealers constantly strive to improve their own lists with names of those who have previously indicated an interest in erotica. In doing so, they will test any list that they can obtain regardless of its nature. The names of those who respond are transferred to the prime list and become a valuable property for sale or barter to other dealers in the same field.

House Hearing, pt. II, p. 71. As we have suggested above, Congress found that saturation mailing from random lists had resulted in repeated solicitations to

people who had never expressed an interest in receiving salacious material and who may have objected to receiving this material, but to no avail. The economics of mail advertising is such that it is far cheaper to continue sending advertisements to addressees with no conceivable interest in responding than to delete the name of an offended addressee. Section 4009(c) attempts to rectify that economic imbalance in the interest of the many offended recipients. The requirement that the sender refrain from trading in lists from which the deletion has not been made is designed simply to insure that the deletion will be made. It is premised on the fact that mailers in a particular trade exchange lists and that a list that has been used by one sender to mail pandering material may be used by another in the same trade to send similar material.

Short of a showing that the removal requirement would be so costly as to prevent the appellants from distributing their advertisements at all,[17] the problem is one which can be handled like any business expense, and scarcely rises to First Amendment dimensions. Alphabetization and codification of the lists are obvious as techniques of reducing these costs among those whose business is such that they frequently re-

[17] We do not concede that constitutional problems would arise even if such an effect were occasionally felt. The limiting construction suggested above, pp. 39–41, requiring the addressee's discretionary determination regarding pandering to have been made in good faith, would foreclose any possibility that a concerted effort might be made to drive a mail advertiser, such as a magazine, out of business for essentially ideological reasons.

ceive such orders.[18] Even as the lists are presently kept, the costs of deleting names appear not to be great.

Thus, one of the appellants states in an affidavit (App. 17–19) that his business possesses 115 lists, each containing 20,000–25,000 names, or a total of 2,300,000 to 2,875,000 names. He states that he has received to date 250 prohibitory orders and more than 3,000 requests from mailers to whom the lists are rented that names be removed from the lists. His total cost of removing these names is estimated at $7,000.00. Assuming these figures to be accurate, the cost per name-removal is therefore $2.18. When the cost is spread over the total number of names on this affiant's lists, it amounts to less than one-third of one cent per name. Thus, far short of a finding that the expenses imposed by the statute tend to diminish the flow of ideas, appellants' argument is that even though an addressee has deliberately taken the trouble to file a form stating that he wishes to receive nothing more from a named mailer, that mailer has the constitutional right to override the addressee's decision and the judgment of Congress and force him to file a new form each time

[18]Although appellant's affidavits suggest to the contrary (App. 19, 23–24, 37), it is Post Office policy not to proceed with orders unless the complaining addressee forwards all information necessary to enable the sender to identify the name and address used on his lists. For that reason, the addressee is required to submit all the materials he receives, including mailing labels, to the local postmaster. App., *infra*, p. 58. That information is then to be transmitted to the mailer. We are informed that the Post Office would not seek judicial enforcement of an order unless this has been done, and concede that it would be improper to grant such enforcement unless the information had been conveyed, giving the sender an opportunity to comply.

he is repulsed or offended by the material he receives. There is nothing but empty formalism in this contention.

B. SINCE SECTION 4009 PROVIDES FOR ADEQUATE NOTICE AND A FULL JUDICIAL HEARING BEFORE ANY SANCTION ATTACHES, IT COMPORTS WITH DUE PROCESS OF LAW

Section 4009 provides that at the request of a complaining addressee a prohibitory order shall issue to the sender. The order directs the sender to refrain from further mailings to the named addressee. If the Postmaster General believes the sender is violating the order, he then serves a complaint on the addressee and allows fifteen days for a response. If the addressee so requests, a full hearing is held to determine whether there has been a violation of the prohibitory order.[19] If a violation is found, the Postmaster General may request the Attorney General to apply for a district court order directing compliance. At this stage, the sender is entitled to a full hearing before the district court. He may contest the evidence of the violation and the validity of the order. Cf. 3 Davis, *Administrative Law Treatise,* § 23.07, p. 320–321 (1958). If, for example, the court finds that an order had been issued although there had not been an advertisement offering something for sale, it may decline to enforce it. The panoply of procedural protections, including subpoena, confrontation and cross-examination, are available in the district court.

[19] The hearing also would consider any contention that the mailing initially complained of was not an advertisement of matter for sale.

If the court finds a violation, it will then issue an order directing compliance with the prohibitory order. Up to this point, the sender has risked nothing. Only if he violates the order of the court does he risk contempt. Even then, willfulness would be an element of the contempt, and then there would be still another hearing to determine whether the court order had been violated. Finally, the penalty to be imposed would be determined by the court and would depend on the circumstances of the contempt.

The statute, then, contemplates one administrative hearing and two judicial hearings before the contempt sanction may attach. The procedural safeguards are sufficient, especially given the insubstantial interest a sender has in continued mailings to an objecting addressee, and they are afforded in advance of any sanction. *Nickey* v. *Mississippi,* 292 U.S. 393, 396. At every stage, the burden of moving for enforcement rests with either the addressee or the government. Section 4009 accords every element of due process. Cf. *Freedman* v. *Maryland,* 380 U.S. 51.

For the reasons set out above, we believe that the statute infringes none of appellants' constitutional rights. Therefore, we have not discussed whether it would also be constitutional as construed by the majority below, or by the concurring judge.[20] Of course, we agree with the concurrence that Congress'

[20] For the reasons set out in the opinion of the concurring judge, there could be little doubt of the constitutionality of a scheme requiring an objective determination of pandering. App. 76–77; *Ginzburg* v. *United States,* 383 U.S. 463, 467–468.

> overriding intent was to enact a constitutional statute which would simultaneously shield senders of materials entitled to First Amendment protection from interference with their mailing rights and give to addressees offended by solicitations from commercial pornographers a remedy for their distress. [App. 77 n. 6.]

See *Senate Hearing,* pp. 518–519, 525–528, 532–534; *House Hearing,* pt. 1, pp. 8, 11; H. Rep. No. 722, 90th Cong., 1st Sess., pp. 68–69 (1967); 113 Cong. Rec. 28659–28661, 34230–34232 (1967). And if convinced that a limiting construction were necessary "in the candid service of avoiding a serious constitutional doubt," *United States* v. *Rumely,* 345 U.S. 41, 47, this Court might be warranted in such a construction of the Act. Cf. *Greene* v. *McElroy,* 360 U.S. 474; *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146.

We think there must be serious hesitation even before finding a requirement of judicial review of the issue of pandering to avoid such doubts, when it is so clear Congress precisely chose against such procedure. And, even if there is a basis for constructing the framework of judicial review anticipated by Senator Javits, 113 Cong. Rec. 34231, and which would have been required by the concurring judge below (App. 76), it would completely rewrite the statute to establish an *administrative* determination of pandering *vel non.* Cf. *United States* v. *Robel,* 389 U.S. 258, 262. Neither an administrative determination of pandering nor a test of permissible "further mailings"

which would depend upon the materials an addressee initially found objectionable, see pp. 26–27 *supra*, would be an acceptable reworking of the statutory scheme.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

39 U.S.C. (Supp. IV) 4009:

§ 4009. Prohibition of pandering advertisements in the mails.

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

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(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of

part I of title 5, United States Code, shall not apply to any provisions of this section.

(i) For the purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.

POD Publication 125, April 1968

A Guide for Postal Service Centers

Administering the Pandering Advertisements Statute

(39 U.S. Code 4009)

Post Office Department, Washington, D.C. 20260

I. INTRODUCTION

On December 16, 1967, President Lyndon B. Johnson signed into law the Postal Revenue and Federal Salary Act of 1967 (Public Law 90–206), Title III of this act added a new section to Title 39, the Postal Service Title of the United States Code. The new section, numbered 4009, was given an effective date of April 14, 1968.

Section 4009 was enacted as a response to the increasingly serious problem of use of the United States mails by smut peddlers. All too much of the erotic material sent through the mail is not prohibitable under the Postal Obscenity Statute, Title 18, United States Code, 1461. Thus Congress developed section 4009 as an effective auxiliary method of controlling the flow of erotic material in the mail.

To avoid Constitutional objections (freedom of speech and press) which would surely invalidate any attempt to give the Government far-reaching power to initiate prohibition of erotic matter from the U.S. mails, Congress placed the responsibility for initiating such prohibition with the postal patron. Thus it is important to remember that in commencing proceed-

ings under section 4009, the initiative must originate with the postal patron—not with the Post Office Department. The Department's proper role in the commencement of proceedings under this statute is solely to inform the patron, as much as necessary, of his rights under the new law, and to process his case once he has decided to initiate action. Such information will be made available to inquiring postal patrons at Headquarters and field installations. Processing of each case will be handled by the postal services centers listed in section 318.5, Postal Manual. Administrative hearings on these cases will be handled by the offices of regional counsel. Appeals from adverse decisions resulting from such administrative hearings will be handled by the Mailability Division, Office of the General Counsel, Post Office Department, Washington, D.C. 20260.

II. THE PATRON'S RESPONSIBILITY

Section 4009 proceedings cannot commence until a postal patron has decided a mail piece he has received constitutes a pandering advertisement offering to sell erotically arousing or sexually provocative matter. The patron has, by the provisions of the new law, the sole authority and responsibility to make this decision.

If the patron decides he has received such a mailing, and if he desires the Post Office Department to prevent the sender of that mailing from making any further mailings to him and/or his children under nineteen years old residing with him, he must notify the Post Office Department of these facts.

The Department provides Form 2150, Notice for Prohibitory Order Against Sender of Pandering Advertisement In the Mails, for the patron's use. The patron must print on the form the name and address

of the addressee of the objectionable mailing, and the name and address of the sender of that mailing. He must also print in the names and birth dates of any of his children he desires to be protected by the Department's order. Children eligible for such protection are unmarried children of the addressee who are under nineteen years old and reside with the addressee under his care.

The addressee must then sign the form, which includes a statement of his decision concerning the character of the mailing, a statement as to the eligibility of any of his children listed thereon, and a request for issuance of an order under the provisions of section 4009. If Form 2150 is not available, or if, for any other reason, an addressee does not use the form, he must be sure to include all the aforementioned statements, requests, information, and signature in the Notice he prepares on plain paper.

The patron should send this Notice together with the objectionable mailing (wrapper and enclosures) to his local postmaster or preferably to his nearest postal services center. If the Notice is sent to the local postmaster, it should contain on the front of its envelope the printed words "REQUEST FOR PROHIBITORY ORDER". This will facilitate forwarding by the local postmaster to the appropriate postal services center.

III. PROCESSING THE PATRON'S REQUEST

When a patron's Notice for Prohibitory Order is received at a postal services center, first determine whether it has arrived at the proper services center. Each Notice will be processed at the postal services center which encompasses the patron's city. A Notice arriving at a services center outside the patron's area

should be forwarded to the appropriate services center.

A patron's Notice, properly directed to the correct services center, should be assigned a case number running chronologically.

Each services center will maintain a log book of Notices processed during each calendar year. When a case number has been assigned, enter that number in the log book. Next to the number enter the following:

a. The name and address of the patron sending the Notice.

b. The name and address of the mailer complained of in the Notice.

c. The name of the services center employee to whom the Notice has been assigned for processing.

d. The day, month, and year when the Notice was received by the services center.

Each services center will also keep a log of Notices received which were not within its geographical jurisdiction and were therefore forwarded to the appropriate services center for processing. These forwarded Notices will not be assigned a case number by the forwarding services center. Record only the name and address of the patron; the day, month and year the Notice was received; the day, month, and year the Notice was forwarded; and the services center to which it was forwarded.

The next step in processing a Notice is to jacket the Notice, with all accompanying enclosures, in a folder. All matter pertinent to the case would be filed in this jacket.

When determined that the patron has properly done his part as described in part II, the mailing which the patron has characterized as a pandering advertisement must be examined to determine if it is, in fact, an advertisement. It is important to emphasize, at this

point, that the only question to be determined by the services center with respect to the offending mail piece is whether it constitutes an advertisement. The Department has no authority to review or question the patron's decision that the subject matter of the offending mail piece is erotically arousing or sexually provocative.

To constitute an advertisement, the offending mail piece must be material—including, but not limited to, display, classified or editorial styles—which offers for sale any matter which the addressee thereof believes, in his sole discretion, to be erotically arousing or sexually provocative.

If a patron's Notice does not furnish the necessary information, is not properly completed, or does not enclose all of the offending mail piece, send a statement of the deficiencies of the notice to the patron, suggesting that they be corrected if he desires action under section 4009. Retain the deficient original Notice, with any accompanying enclosures, in the case file except where it is absolutely necessary that part or all of them be returned to the patron so he can make the required corrections.

If the offending mail piece is found by the services center to not constitute an advertisement as defined above, notify the patron of this finding and that, therefore, the requested prohibitory order cannot be issued.

IV. ISSUANCE OF THE PROHIBITORY ORDER

When a patron's Notice is properly completed and filed, and the offending mail piece is, in fact, an advertisement as defined herein, then under the authority delegated by the Postmaster General, the postmaster of the services center shall issue a Prohibitory Order on Form 2152. Insert the case number

on the form in the "Prohibitory Order No." blank. Strike out the words, "and his minor children residing with him who have not attained their nineteenth birthday", appearing in brackets on the front of the form, if the addressee has not requested inclusion of such children in the order. List the names of the parties to be protected by the order in the blanks provided. Also list the address to be protected by the order in the appropriate blank. The Order shall be signed by the postmaster of the services center, postmarked in the space indicated on the order, and dated with the date the postmaster signed it. Send the original Order registered mail, return receipt requested, to the mailer of the offending mail piece. Send a copy of the Order to the addressee of the offending mail piece. Place other copies in the case file.

If, after a Prohibitory Order has been issued, the issuing services center receives notification from the patron who requested the Order that he has moved to an address different from the one covered in the order, the services center shall issue a modified Order to the mailer covering the new address. Send the original of the modified Order registered mail, return receipt requested, to the mailer. Send a copy to the addressee, and place other copies in the case file. The modified Order will supersede the original Order and the statutory periods of time allowed for compliance with a Prohibitory Order shall begin to run from the date of the mailer's receipt of the modified Order.

V. VIOLATIONS OF PROHIBITORY ORDERS

The Prohibitory Order issued under section 4009—including any modified Order—will direct the mailer of the pandering advertisement, effective thirty calendar days after the mailer's receipt of the Order, to make no further mailings of any kind to the persons

protected by the Order. As stated, this prohibition extends to any and every type mailing, not just future pandering advertisements.

Thus, if on or after the thirtieth calendar day after the date of the mailer's receiving the Order, that mailer deposits in the mails anything addressed to the persons and address protected by the Order, that mailer has thereby violated the Prohibitory Order.

In determining whether a Prohibitory Order has been violated, bear in mind that matter deposited in the mails and bearing the address protected by the Order, shall be considered, by authority of section 4009, as being addressed to a person protected by the Prohibitory Order even though no person's name appears on the mail piece as addressee of that mail piece. If a person's name does appear on the mail as addressee of that mail piece, and such name is not one protected by the Prohibitory Order, the mail piece does not violate the Prohibitory Order. Such a non-violative mail piece should be returned to the mails for normal handling.

Each Prohibitory Order will also direct the mailer, effective immediately upon his receipt of the Order, to delete the names of the persons protected by the Order from all mailing lists owned or controlled by the mailer or his agents or assigns. Further, the Order will direct the mailer to immediately refrain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the protected persons. If the mailer fails to comply with these directions, he will have violated the Order.

If any violation of a Prohibitory Order is committed, it is no defense or justification to the mailer that the violation was committed by his agents or assignee. All Prohibitory Orders apply as fully to the mailer's agents and assigns as they do to the mailer

himself. Of course, the form of organization or entity in which the mailer conducts his business—be it in the form of a sole proprietorship, partnership, unincorporated association, corporation, etc.—makes absolutely no difference in the effectiveness of a Prohibitory Order. The Order applies to the mailer, his agents and assigns no matter in what form of organization they choose to conduct their business.

Upon a services center's receiving evidence that a Prohibitory Order it issued has been violated, the services center shall immediately send to the apparent violator by registered mail, return receipt requested, a Violation Complaint, Form 2153, and copy of the Rules of Practice (POD Publication 124). Prepare the complaint on Form 2153. The original goes to the apparent violator, and copies are placed in the case file. The Docket Number is obtained by calling the regional counsel. Directly under the Prohibitory Order number and following the words "Issued Against", insert the name of the mailer against whom the Prohibitory Order was issued. Insert the name of the addressee complaining of a violation of the Order—or, in cases where the evidence of violation is submitted by other than a protected addressee, the name of the addressee who requested the Prohibitory Order—in the "Complaining Addressee" blank. Indicate the nature of the violation on the Complaint by using any or all of paragraphs 1, 2, or 3. If none of these paragraphs is suitable, describe the violation in paragraph 4. Strike out any of the numbered paragraphs which are not applicable to the particular violation. Complete other items as indicated on the forms.

The Complaint indicates that exhibits evidencing the alleged violation are attached to the Complaint. This does not mean that the originals of the evidence of violation should be sent to the alleged violator. On

the contrary, attach the originals of the evidence to the first copy of the Complaint form and place in the case file. Make photocopies in quadruplicate of the evidence, and attach a complete photocopy of all the evidence to the original Complaint which goes to the apparent violator. Attach complete photocopies of all evidence to the second, third, and fourth copies of the Complaint and place in the file.

The alleged violator has fifteen days from the date of his receipt of the Complaint within which to request a hearing on the allegations.

If he makes such a request within fifteen days after the date of receipt, the services center should place the request in its file of the case. The case file should then be sent by registered mail, return receipt requested, to the office of regional counsel for the region in which the services center is located. If there is no incumbent regional counsel for that region, send the file to the incumbent regional counsel of the nearest regional office.

If a request for a hearing is not filed within the allotted fifteen-day period, the services center shall continue to handle the case. The postmaster of the services center will proceed to examine the evidence of violation to determine if, in fact, a violation has occurred. In arriving at such determination, the postmaster will consider any matter in response to the Complaint which the mailer has filed with the services center within fifteen days after his receipt of the Complaint.

If the postmaster concludes a violation has been committed, he shall send notice of this conclusion—using Form 2154—to the mailer. Fill out Form 2154 in the manner prescribed for the other forms. Place copies of the notice of the postmaster's conclusion in the case file and then forward the entire file by regis-

tered mail, return receipt requested, to the Assistant General Counsel, Mailability Division, Post Office Department, Washington, D.C. 20260, for further processing.

If the postmaster concludes, after weighing all the evidence and any timely-filed response of the mailer, that the Prohibitory Order has not been violated, he will write a brief memorandum of his opinion and place it in the case file along with all the matter considered in reaching his decision. However, if a piece of mail submitted as evidence of violation of an Order has not yet been delivered to the addressee, place a photocopy of it in the file and return the mailpiece itself to the mails for normal handling.

VI. CONCLUSION

The purpose of this guide is to assist Departmental implementation of section 4009. Careful attention to this guide will keep procedural and administrative problems to a minimum. Applying the rules in a fair, common-sense, courteous manner, is indispensable to the smooth functioning of any extensive system. In these respects the Department has the utmost confidence in the capabilities of the employees charged with the responsibility of making this new law work.

Should questions arise at the postal services center level requiring technical guidance not furnished by this guide or other Departmental publications, contact the appropriate regional counsel. Questions which cannot be resolved by the regional counsel shall be presented by them to the Assistant General Counsel, Mailability Division, at Headquarters.

With the harmonious cooperation of all levels concerned in administering section 4009, the intent of Congress and the desire of the Department to protect the privacy of the postal patron will be more effectively accomplished.

HOW YOU CAN CURB PANDERING ADVERTISEMENTS

A family receiving a pandering advertisement which it finds offensive has authority under a new Federal law[1] to ask that its members receive no more mail *of any kind* from the sender. An advertisement is considered pandering if it offers to sell material which is, *in the opinion of the recipient,* "erotically arousing or sexually provocative." The material can be in the form of a display, classified, or editorial-style advertisement.

The individual mail patron is the sole judge of whether an advertisement is offensive to him. If you or your family finds the material offered is of a pandering nature, complete the statement on the back page of this leaflet in asking a postmaster to curb the receipt of additional mail from the sender. Children under 19 years of age residing in your house can be listed in the request by name and age.

PURPOSE OF LAW

American families are shocked on occasion by advertisements which they find offensive or believe to be morally harmful to their children. While in most cases the ads are not legally obscene and are therefore mailable, they are clearly unwelcome in many homes. This law gives families the right to decide they want no more mail from a firm sending out what they consider pandering advertising, but it does not deny others the right to an unrestricted flow of material which is mailable.

With the major share of the so-called pandering advertising coming from a small number of dealers, many of whom exchange mailing lists, it is believed

[1] *Prohibition of Pandering Advertisements In the Mail, Public Law 90–206, Title III, 39 U.S. Code § 4009.*

that the patron's request will provide substantial relief to those who do not want such material.

HOW THE LAW WORKS

Families receiving advertising from U.S. mails which they believe is pandering can ask a postmaster to direct that the promoter send no more mail, of any kind, to them. The sender is also ordered to remove the family's name from any mailing lists he owns, controls or rents. If a family moves and it wishes to continue the order at the new address, it is necessary to furnish the new address to the postmaster who issued the order.

ENFORCING THE LAW

The Post Office Department and the Department of Justice are required by the law to follow several specific steps in carrying out a family's request that it receive no more mail from a firm mailing what they believe is pandering advertising.

When the patron's request is properly submitted the Post Office Department sends a "prohibitory order" directing the sender to refrain from any further mailing of any kind to the complaining patron. This is effective 30 days after sender's receipt of the order.

The patron must bring any violation of the order to the attention of the postmaster who issued the order, enclosing all evidentiary matter, such as the second mailing and its envelope.

If the mailer still fails to respect the order, and the Department finds that it is being violated, the Postmaster General will ask the Attorney General to apply for a Federal Court order directing compliance. Failure to observe the court's order may be punishable by a fine or imprisonment.

To initiate an order . . . Send offensive advertisement, its envelope and signed form to postmaster with the words: "Request for prohibitory order" on face of your envelope.

USE THIS FORM

I, _____ addressee
(parent of addressee) of enclosed
mailing from _____
(print mailer's name)

_____
(address ,city, state, ZIP code)

consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, § 4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me, [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

_____
Your signature Date

_____
Street

_____
City, State, and ZIP Code

List Children and Birthdates:

_____

_____

_____

_____

U.S. GOVERNMENT PRINTING OFFICE: 1970